No. 04-1067

Supreme Court, U.S.
FILED
MAR 10 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

STATE OF GEORGIA,

Petitioner,

vs.

SCOTT FITZ RANDOLPH,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

WILBUR T. GAMBLE, III
P.O. Box 577
177 South Main Street
Dawson, Georgia 39842
(229) 995-5657
Bar No.: 0283170

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
Statement of the Case	1
Reasons for Denying the Writ	1
Conclusion	5

TABLE OF AUTHORITIES

CASES CITED:

Powell v. State, 270 Ga. 327, 510 S.E. 2d 18 (1998) 1, 2

Randolph v. State, 264 Ga. App. 396 (2003) 2

United States v. Matlock, 415 U.S. 164 (1974) 3

STATEMENT OF THE CASE

Respondent, Scott Fitz Randolph agrees with the general statement of the case included in Petitioner's Writ of Certiorari, with a few exceptions. Respondent adds to the statement of the case that not only did Scott Fitz Randolph initially refuse a request to search his home but Scott Fitz Randolph repeatedly told the investigating Officer he did not have permission to search his home. This denial of the right to search was unequivocal and unambiguous.

REASONS FOR DENYING THE WRIT

Respondent respectfully shows this Court that Petitioner's request for Petition for Writ of Certiorari should be denied. There is no compelling reason for this Court to intervene concerning the ruling of the Supreme Court of the State of Georgia.

Petitioner asserts this Court should decide the matter because, "there is currently a conflict among Federal and State Court on whether Police may obtain valid consent to search from one occupant with common authority over shared premises in the face of another occupants presence and objection to the search." (Petitioners Brief, Page 7) The fact a conflict exist between various States does not mean a uniform ruling is necessary or even desired.

The Georgia Court of Appeals in it's initial ruling in favor of Randolph correctly cited the case of *Powell v. State*, 270 Ga. 327, 510 S.E. 2d 18 (1998) which reiterated the long held proposition under Georgia Law that "the right to be let alone" guaranteed by the Georgia Constitution is

far more extensive than any right of privacy protected under the United States Constitution. *Id.* at 330, see *Randolph v. State*, 264 Ga. App. 396, FN11 (2003).

Each State has the inherit right to extend the protection of one's right to privacy if a State so chooses. The fact that several other jurisdictions have ruled in a contrary way to the State of Georgia does not establish the need for a conforming Federal Ruling. Allowing this ruling to stand will not place any undue burden on law enforcement because all law enforcement Officers in the State of Georgia can easily be made aware of the bright line test established by the Supreme Court of Georgia. The same holds true for any Federal Agents who may operate within the State of Georgia.

The State of Georgia wrongfully argued the current ruling by the Supreme Court of Georgia unfairly leaves citizens with a rule which turns upon the timing of a request to search. This argument placed before the Court is quite illogical. The State argues that if the officer had waited until Mr. Randolph left the home the Officer would then have been able to search the home by simply asking permission from Mrs. Randolph. The State claims this results in timing (based on who is or who is not present) being the issue in deciding whether or not to search. No matter the rule of law established, this fact will remain the key. If Mrs. Randolph had left the home and the police officers requested the right to search from Mr. Randolph, it is undeniable the officers would not have had the right to search the home. This denial would be based on the timing of requesting the right to search from the husband after the wife had left the home. Under any rule devised it will always be a matter of timing in determining these type matters.

The real issue concerns the construction of the rule of law that establishes the right of one co-occupant to allow the complete search of a home. Almost all Courts have agreed that if one co-occupant is present they have the right to allow the search of a home even if the other co-occupant is not asked or is not present. See *United States v. Matlock*, 415 U.S. 164 (1974). This rule of law was established based on the creation of a legal fiction that a co-occupant has either assumed the risk that the co-occupant will allow a search or by virtue of living with the co-occupant has implied the right of the co-occupant to grant the right to search. These legal fictions were created to protect police officers so they did not need to establish every occupant residing at a particular residence prior to searching the home. The rule of law is sound when applied under these conditions.

In a situation in which both co-occupants are present, however, there is no need to apply a legal fiction. By way of analogy, in most Civil cases persons still maintain the right to take the 5th Amendment and refuse to testify on grounds that the testimony might incriminate the individual. This right of refusal exists but a jury is instructed they may infer from the taking of the 5th Amendment that testimony would be harmful to the individual if presented. If, however, the individual changes their mind about the 5th Amendment and decides to testify the inference disappears. The same holds true concerning co-occupants. If they are both present, the inference and any assumption of risk disappears. The co-occupant is then present to state affirmatively whether or not he wishes to allow a search. Once refusal is stated, this refusal should not be trumped by the permission of a co-occupant.

The State argues just the opposite: affirmative permission to search the home should not be trumped by the co-occupant's refusal. The Court should balance the interest of both parties in making a decision as to which parties statement should be controlling. Which right is more important; the right to be free from an illegal or unwarranted search and seizure of ones property or the property right of one to allow a search? Clearly, the 4th Amendment right to protection against unreasonable search and seizure clearly outweighs any right a co-occupant may have in allowing a search. Arguments stating this will deter a co-occupant from reporting a crime are without merit because under these circumstances the Police may be able to search if there is danger of harm to someone under the exigent circumstances exception and otherwise, the police have a valid reason to obtain a warrant based on a co-occupant's report of some type criminal behavior, illegal evidence or the like.

This Court should not grant Certiorari in this matter because each State has the right to establish it's own rule of law concerning search and seizure so long as it does not infringe upon the constitutional rights granted by the United States Constitution. The Supreme Court of Georgia's ruling does not interfere with or unconstitutionally affect the rights of it's citizens under the United States 4th Amendment protections. Secondly, the ruling of the Georgia Supreme Court does not place an unfair rule of law upon the citizens of the State of Georgia and in fact, simply grants a more extensive right to privacy under Georgia's Constitution.

CONCLUSION

Wherefore for all of the foregoing reasons, Respondent, Scott Fitz Randolph, prays that this Court deny the State of Georgia's Petition for Writ of Certiorari because the question presented by the State is not one which requires Federal law conformity and the rule of law established by the Supreme Court of Georgia is well reasoned and constitutional.

Respectfully submitted, this 10th day of March, 2005.

COLLIER & GAMBLE, LLP
W. T. GAMBLE, III

This Document Prepared By:

WILBUR T. GAMBLE, III
State Bar No. 0283170
COLLIER & GAMBLE, LLP
Attorneys at Law
P.O. Box 577
Dawson, GA 39842
(229) 995-5657